In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-968

JOHN VICTOR ROEDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A6) is reported at 526 F.2d 736.

JURISDICTION

The judgment of the court of appeals was entered on November 7, 1975. A timely petition for rehearing was denied by the court of appeals on November 26, 1975. The petition for a writ of certiorari was filed on January 8, 1976.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]The petition is thus out of time under Rule 22(2) of the Rules of this Court. The court of appeals granted petitioner's motion to stay the mandate on December 9, 1975, but that order does not affect the time for filing this petition.

QUESTIONS PRESENTED

1. Whether the knowing transportation of a woman across state lines to engage in sexual intercourse for payment violates the Mann Act, when these actions occur as part of making a sexually explicit film.

2. Whether, if the Mann Act applies in these circumstances, the Act abridges petitioner's First Amendment rights.

STATUTE INVOLVED

The Mann Act, 18 U.S.C. 2421, is set out in relevant part at Pet. 3.

STATEMENT

After a jury trial in the United States District Court for the District of Kansas, petitioner was convicted of transporting a woman in interstate commerce for the purposes of prostitution or debauchery or other immoral purpose, in violation of 18 U.S.C. 2421 (the Mann Act).[2] Petitioner received a suspended three-year prison term and was directed to serve four months in a community treatment center, to be followed by three years' probation. The court of appeals affirmed (Pet. App.).

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[2]Although the judgment of the district court recites that petitioner was convicted of interstate transportation for the purposes of prostitution, debauchery or other immoral purposes, the jury was instructed to consider only whether the transportation was for the purpose of prostitution and, over the objection of the government (Tr. 160-161, 230), not to consider whether the interstate transportation had been for the purpose of debauchery or other immoral purpose (Tr. 214-215; see Stip. 4).

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The evidence at trial showed that on December 6, 1970, pursuant to an earlier arrangement, petitioner transported Bobbie Lynn Eicholz from Missouri to Kansas (Stip. 2).[3] During the trip, petitioner explained to Eicholz that she would be performing various sexual acts with petitioner which would be filmed, and that she would be paid for doing so (Stip. 2-3). Petitioner also told Eicholz that while in Kansas she "didn't have to" "have sex with anybody there for money," "if [she] didn't want to" (Tr. 72).[4] Eicholz testified that during the trip petitioner warned her that, if questioned, she was not to mention his name because "men could get into trouble for things like this" (Tr. 60).

In Kansas, petitioner and Eicholz engaged in various sexual acts, including sexual intercourse (Stip. 3). These acts were recorded on film (Stip. 3).[5] Several persons paid petitioner money to watch the activities (Stip. 3). One man asked petitioner if Eicholz would have intercourse with him (Tr. 65). Petitioner asked Eicholz but she refused (Tr. 65). Petitioner thereafter returned Eicholz to her home in Missouri and paid her $100 in cash in return for her activities of the day (Stip. 3; Tr. 66).

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[3]"Stip." refers to the stipulation of facts submitted to the court of appeals in connection with the appeal of this case. We are lodging a copy of the stipulation with the Clerk of the Court.

[4]"Tr." refers to the transcript of the trial (excluding *voir dire* and sentencing), a copy of which we are lodging with the Clerk of the Court. It was not before the court of appeals.

[5]The film, which is approximately 20 minutes long (Tr. 15), was introduced by the government (and viewed by the jury (Tr. 120)) to corroborate the testimony of its witnesses concerning the identity of the persons and the nature of the sexual activity in which they engaged (Tr. 11-15).

Petitioner apparently received no proceeds from subsequent sales of the film (Stip. 3). Indeed, Eicholz suggested the film was not processed for some time (Tr. 63). When it was developed, Eicholz herself sold copies of the film and retained the proceeds (Tr. 80, 93-94). Eicholz explained that in August 1971 she started a business with several other women in which they would entertain men by having a party and showing the film (Tr. 94). It was in this way that Eicholz sold copies of the film (Tr. 93-94). At least some of the men were sent to Eicholz by petitioner (Tr. 94).

For the purposes of establishing a common scheme or other circumstantial evidence of petitioner's unlawful intent (see Tr. 70, 222), the government introduced evidence that petitioner and Eicholz traveled to Hawaii a short time after the events for which petitioner was convicted in the instant case. Eicholz raised the money for her transportation to Hawaii at a party which petitioner had arranged and which was attended by a number of men (Tr. 67-68). Petitioner explained to Eicholz that in Hawaii they would engage in sexual acts which would be filmed (Stip. 3; Tr. 67-69) and that, in addition to making films, she could also make some money on the side with men (Tr. 116). In Hawaii, petitioner and Eicholz engaged in sexual intercourse, which was filmed and for which Eicholz was paid $100 (Tr. 68-69).

Eicholz testified that she had a prior conviction for conspiring to violate the Mann Act (Stip. 3), apparently in connection with incidents other than the one involved in this case (see Tr. 82).

ARGUMENT

1. Petitioner contends that his conduct did not violate the Mann Act because that statute does not

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reach the making of a sexually explicit motion picture (Pet. 9). The basis upon which petitioner was convicted, however, was that he transported Eicholz in interstate commerce for purposes of prostitution—engaging in sexual intercourse for compensation. Petitioner took her from Missouri to Kansas for the express purpose of engaging in sexual intercourse with her, paid her $100 for doing so, permitted others to observe the sexual activities for money, and was aware that while there Eicholz might have paid intercourse with others. Petitioner apparently retained no interest in the film; he received none of the proceeds from its sales.

Prostitution has an element of debauchery, although the latter term in the Mann Act presumably is broader than the former. Webster's *New International Dictionary* (3d ed., 1961) defines prostitution to include "indulging in promiscuous sexual relations esp. for payment." *The Random House Dictionary of the English Language* (1966 ed.) defines prostitution as the "act or practice of engaging in sexual intercourse for money." This Court has defined "prostitution" as used in the Mann Act as referring "to women who for hire or without hire offer their bodies to indiscriminate intercourse with men." *United States* v. *Bitty*, 208 U.S. 393, 401, quoted in *Caminetti* v. *United States*, 242 U.S. 470, 486. Petitioner's transportation of Eicholz was for that purpose.

The fact that Eicholz engaged in sexual intercourse for compensation as part of the making of a film does not remove petitioner's conduct from the prohibition of the Mann Act. There is no evidence of a prior relationship between Eicholz and petitioner other than the meetings to arrange the trip (Tr. 55-57); this was simply a commercial exploitation of sexual activities for profit. Nor is there any indication that this activity related to a legitimate or serious

cinematic effort. Eicholz did not engage in the filmed sexual activity because she was an actress or had any interest in the film itself.[6] Indeed, the evidence suggests that Eicholz was a prostitute[7] who agreed to have sexual intercourse with petitioner because she needed the money (Tr. 54-56, 59, 67-68, 87, 94, 116).[8] As the jury was properly instructed (Tr. 216), prostitution need not be the only purpose of the transportation; it is enough that it was one of the dominant purposes of the journey. See, *e.g.*, *United States* v. *Tyler*, 424 F.2d 510 (C.A. 10), certiorari denied, 400 U.S. 839; *United States* v. *Lomas*, 440 F. 2d 335 (C.A. 7), certiorari denied, 404 U.S. 842.

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[6]Eicholz testified that she did not see the film for some time and believed that it had not even been processed (Tr. 63). When she received copies of the film, the evidence suggests she used it to promote a prostitution business with men sent to her by petitioner (Tr. 94).

[7]There is no explicit evidence that Eicholz was a prostitute. But that she was is inferrable from the testimony concerning her motivation for making the film (Tr. 59), her trip to Hawaii (Tr. 68-69, 102, 116), the party prior to the trip at which she earned or raised money to pay for the trip (Tr. 67-68), her prior conviction (Tr. 54, 74, 82), and her operation of what was apparently a house of prostitution (Tr. 94). At a side bar conference (Tr. 95-101) the district judge and counsel for both sides indicated their understanding that Eicholz was a prostitute.

The character of the woman who had been transported is relevant circumstantial evidence of the purpose and nature of the interstate transportation and subsequent acts.

[8]This evidence was not impeached by testimony that Eicholz declined to have intercourse with another man who had watched her perform with petitioner (Tr. 65). To the contrary, this incident confirms that petitioner's transportation of Eicholz was for the purpose of prostitution. When the man asked petitioner whether Eicholz would have intercourse with him, petitioner referred the request to Eicholz—an act that was in accord with petitioner's statement to Eicholz that while in Kansas she was not required to "have sex with anybody there for money" "if [she] didn't want to" (Tr. 72).

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2. Petitioner contends (Pet. 9) that the application of the Mann Act to his activities in this case violates his First Amendment rights as a filmmaker. The conduct for which petitioner was convicted, however, was the interstate transportation of a woman for the purpose of prostitution, not for that of making a film. There is no indication that the film in this case was anything other than routine pornography, made and distributed as such. Whatever incidental impact petitioner's conviction may have had upon his First Amendment rights does not sufficiently implicate those rights to render his conviction unconstitutional. *United States* v. *O'Brien*, 391 U.S. 367, 376-377; see also, *Schact* v. *United States*, 398 U.S. 58, 61-63;[9] *California* v. *LaRue*, 409 U.S. 109, 117-118; *Miller* v. *California*, 413 U.S. 15, 26 n. 8.

3. Contrary to petitioner's suggestion (Pet. 6, 9), this prosecution does not represent an attempt by the federal government to use the Mann Act to regulate obscenity. The government did not contend that the film was obscene; the film was shown to the jury only to prove that petitioner and Eicholz engaged in the sexual acts for which he transported her (Tr. 11-15, 127). The conviction of petitioner for violating the Mann Act in these somewhat unusual circumstances presents no question regarding the use of that statute generally to prosecute the production or distribution of obscene films.

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[9]Although the Court in *Schact* invalidated a statute prohibiting the wearing of a uniform in a theatrical or motion picture production if the actor's portrayal of a member of the Armed Forces tended to discredit the military, on the ground that the tending-to-discredit qualification violated the First Amendment, it recognized that an absolute ban on the unauthorized wearing of the uniform would be valid (398 U.S. at 61).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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